

**U.S. Department of Labor**

Office of Administrative Law Judges  
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**Issue Date: 20 May 2004**

CASE NO. 2003-STA-55

In the Matter of:

PETER P. CEFALU  
Complainant

v.

ROADWAY EXPRESS, INC.  
Respondent

APPEARANCES:

Paul O. Taylor, Esq.  
For the Complainant

Lisa A. McGarrity, Esq.  
For the Respondent

Before: DANIEL L. LELAND  
Administrative Law Judge

**RECOMMENDED DECISION AND ORDER**

This case arises under Section 405 of the Surface Transportation Assistance Act (STAA) of 1982, as amended and recodified, 49 U.S.C. § 31105, and its implementing regulations, 29 CFR Part 1978. Peter P. Cefalu (Cefalu or Complainant) filed a complaint with the Occupational Safety and Health Administration on August 19, 2002 which was found to be without merit. Complainant filed a timely request for a hearing. The case was referred to the Office of Administrative Law Judges and a hearing was held before the undersigned on January 27, 2004 in Chicago, IL.<sup>1</sup> Joint stipulations, Joint exhibits (JX) 1-3 and Respondent's exhibits (RX) 1-5 were admitted into evidence. Both parties filed timely post-hearing briefs.

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<sup>1</sup> On December 16, 2003, the court issued an Order Granting Motion to Compel Discovery and Striking Objections ordering Respondent to comply with Complainant's discovery request for the name of a confidential source who Respondent allegedly relied on to discharge Complainant. Respondent refused to comply and Complainant filed a Motion for Sanctions. In an order issued January 20, 2004, the court granted the Motion for Sanctions in part and precluded Respondent from offering any evidence at the hearing arising from the confidential source.

## STIPULATIONS

At the hearing, the Complainant and Respondent entered into a series of joint stipulations:

1. Complainant Peter P. Cefalu is an individual residing at 2949 South 90<sup>th</sup> Street, West Allis, WI 53227. From November 22, 1999 to February 21, 2002, Complainant was an “employee” of Respondent as defined in 49 U.S.C. § 31101(2).

2. Respondent is engaged in interstate trucking operations and is an employer subject to the Surface Transportation Assistance Act, 49 U.S.C. § 31105.

3. As an employee of Respondent, Complainant operated commercial motor vehicles having a gross vehicle rating of 10,001 pounds or more on the highways in interstate commerce.

4. At all times material, Respondent was an employer as defined at 49 U.S.C. § 31101(3). Respondent maintained a place of business at 6880 South Howell Avenue, Oak Creek, WI 53154.

5. Respondent is a person within the meaning of 49 U.S.C. § 31105.

6. The United States Department of Labor, Office of Administrative Law Judges, has jurisdiction over the parties and subject matter of this proceeding.

7. In February 2002, Complainant was a member of Local 200 of the International Brotherhood of Teamsters. Complainant’s employment was subject to a collective bargaining agreement.

8. On the morning of February 21, 2002, in Milwaukee, WI, a grievance hearing was held which considered a grievance by Teamsters Local 200 protesting the discharge of Jonathan Gomaz, another driver employed by Respondent.

9. At the grievance hearing that considered the discharge of Jonathan Gomaz on the morning of February 21, 2002, a written statement by Peter P. Cefalu was presented to the grievance panel. A true and correct copy of Peter P. Cefalu’s statement is attached hereto as Exhibit “A.” Mr. Cefalu himself was not present at the grievance hearing on February 21, 2002.

10. At the grievance hearing that considered the discharge of Jonathan Gomaz on the morning of February 21, 2002, a representative of Teamsters Local 200 provided Thomas Forrest, a Labor Manager for Roadway Express, Inc., a copy of the statement, a copy of which is attached hereto as Exhibit “A.”

11. On February 21, 2002, Roadway Express, Inc. discharged Peter P. Cefalu.

12. On August 19, 2002, Complainant timely filed a complaint with the Secretary of Labor alleging that Respondent had discriminated against him and discharged him in violation of

the employee protection provisions of the Surface Transportation Assistance Act, 49 U.S.C. § 31105.

13. On or about August 9, 2003, the Secretary of Labor issued preliminary findings and an order pursuant to 49 U.S.C. § 31105 which were served on Complainant's counsel on September 9, 2003.

14. On September 24, 2003, Complainant, by his attorney, filed timely objections to the Secretary's Finding and Order.

15. The gross wages paid by Respondent to the ten truck drivers hired by Respondent after Complainant for Respondent's Oak Creek (Milwaukee), WI terminal for the period of January 5, 2002 to November 1, 2003 are as follows:

<u>Hire Date</u>	<u>Name of Driver</u>	<u>Wages</u>
12/26/99	Rudolph H. Schafer	\$122,868.69
02/28/00	Roger G. Schroeder	\$104,667.92
12/07/00	Robert D. Printz	\$122,725.98
03/10/00	John J. Chieves	\$78,981.77
04/19/00	Rodney J. Izzard	\$119,386.92
05/05/00	Thomas P. Murray	\$87,324.08
07/11/00	James T. Holmes	\$100,435.33
07/21/00	Gregory S. Hahn	\$117,629.33
08/19/01	Robert Torres	\$123,478.79
08/21/00	Duane R. Anderson	\$103,548.59

16. In June 2002, Roadway Express, Inc. paid Peter P. Cefalu \$3,524.88 for accrued vacation pay.

17. Since the date of his discharge by Roadway Express, Inc., Complainant has earned the following wages:

- A. Brandt Truck Line, Inc.:  
2002: \$18,135.08  
2003: \$40,952.50  
2004: \$\_\_\_\_\_ (through January \_\_, 2004).
- B. Baldwin Transfer Company, Inc.:  
2002: \$ 9,632.73
- C. United States Postal Service:  
2003: \$ 905.15
- D. Vaughn Management/Rosatti's Pizza  
2003: \$ 130.25

18. The parties stipulate that the following documents are admissible as evidence in the 2003-STA-55 proceeding pursuant to, but without limitation, 29 C.F.R. § 18.803, including § 18.803(24), § 18.902, and § 18.1005, and neither party will contest the use of these documents (whether individually or by groupings) as evidence during the hearing:

<u>No.</u>	<u>Description</u>	<u>Date</u>
JX-1	Notarized Statement of Peter P. Cefalu (Exhibit "A")	
JX-2	Complainant's 2002 W-2 from Roadway Express, Inc.	
JX-3	Excerpts from Collective Bargaining Agreement	

### ISSUE

Did the Respondent discharge Complainant because of his protected activity?

### SUMMARY OF EVIDENCE

On February 21, 2002, a Joint State Grievance Committee hearing was held in Milwaukee, WS involving a grievance filed by Jonathan Gomaz, a truck driver for Roadway. (TR 12, 34) The committee was composed of an equal number of representatives of trucking companies and the union. (TR 33) Thomas Forrest, respondent's Labor Relations Manager, represented Roadway at the proceeding. (TR 13, 34) Gomaz had been discharged for allegedly falsifying his driver logs. (TR 13) At the hearing, a statement written by Complainant was offered in support of Gomaz. (TR 14, 21) See JX 1.<sup>2</sup> Forrest had not seen the statement previously and initially objected to it, but after he was allowed to read the statement, he withdrew his objection. (TR 36-37) Two other Roadway drivers, Juan Hardin and Ron Adams, testified at the hearing in support of Gomaz and their testimony was similar to Complainant's statement. (TR 15, 18, 37) No disciplinary action was taken against Hardin or Adams. (TR 40) However, on cross examination, Forrest admitted that the testimony of Hardin and Adams differed materially from Complainant's statement, because they testified regarding Roadway's procedure for changing logs but only Complainant asserted that Roadway had asked him to falsify his log and violate an hours of service regulation. (TR 50) The grievance committee hearing ended at twelve noon and Gomaz was reinstated with no back pay. (TR 13, 38)

After the grievance hearing ended, Forrest called Robert Schauer, who was then assistant terminal manager at the Milwaukee facility, and told him to reinstate Gomaz and place him back in active service. (TR 38) He stated that he did not mention Complainant's statement to Schauer because it was not unusual for such a statement to be offered at a grievance committee hearing (TR 39) He also did not tell Phil Stanoch, Vice President of Labor Relations to whom he reported, of the statement because "it's of no consequence". (TR 41) Between 4:00 pm and 5:00

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<sup>2</sup> Complainant's statement read:

A few days after the log (mine) was found to be over hours Lisa Mobley told me to change it or I would get a letter. I told her I couldn't so she sent me a letter. In the situation where I had to take a drug test at the end of a shift but I was out of hours-I protested that I was out of hours but they told me that (dispatcher) I would be paid the next day and that if I didn't take the test I would be in violation-like refusing to take a drug test.

pm on February 21, 2002 Stanoch initiated a conference call with Schauer and Mike Jones, then the relay manager in Milwaukee, and told Jones to fire Cefalu. (TR 60, 69) Schauer and Jones testified that Stanoch did not mention Complainant's statement at the grievance committee hearing, and neither Schauer nor Jones was aware of the statement at that time. (TR 60, 70) Jones then called the Complainant and told him that he was fired for falsifying his employment application. (TR 26, 69)

### CONCLUSIONS OF LAW

To prevail in a whistleblower complaint filed under the STAA, the complainant must establish that his employer took adverse employment action against him because he engaged in protected activity. Under the traditional burden shifting analysis, the complainant must initially prove a *prima facie* case by showing: 1) that he engaged in protected activity; 2) that his employer was aware of his protected activity; 3) that he suffered an adverse employment action; and 4) the existence of a causal link or nexus raising an inference that he was retaliated against because of his protected activity. If the complainant makes out a *prima facie* case, the burden shifts to the employer to articulate a legitimate business reason for taking the adverse employment action, and the complainant must then show that the articulated reason is a pretext and that the employer discriminated against him because of his protected activity. *Shannon v. Consol. Freightways*, ARB No. 98-051, ALJ No 1996-STA-15 (ARB April 15, 1998). The Administrative Review Board has held that in a case tried fully on the merits, it is not particularly useful to analyze whether the complainant has established a *prima facie* case. Rather the relevant inquiry is whether the complainant established by a preponderance of the evidence that the reason for his discharge was his protected safety complaints. *See Pike v. Public Storage Companies, Inc.*, ARB No. 99-072, ALJ No. 1998-STA-35 (ARB Aug. 10, 1999). *See also Johnson v. Roadway Exp.*, ARB No. 99-111, ALJ No. 1999-STA-5 (ARB Mar. 29, 2000). Therefore I will not specifically address whether Complainant has established a *prima facie* case, but I will consider the elements of a *prima facie* case to determine whether the Complainant was discharged due to his protected activity.

#### Protected Activity

Section 31105(a) states:

A person may not discharge an employee, or discipline or discriminate against an employee regarding pay, terms or privileges of employment, because-

- (A) the employee... has filed a complaint or begun a proceeding related to a violation of a commercial motor vehicle safety regulation, standard, or order, or has testified or will testify in such a proceeding;

To be covered by this provision, the complainant must show that he testified in a proceeding based on possible safety violations. *Yellow Freight System, Inc. v. Martin*, 954 F. 2d 353 (6<sup>th</sup> Cir. 1992).

In *Yellow Freight System, Inc. v. Reich*, No. 95-4135, 1996 U.S. App. LEXIS 33233 (6<sup>th</sup> Cir. Dec. 16, 1996), an unpublished decision, the Court considered whether the complainant's testimony at a grievance committee hearing implicated safety and therefore constituted protected activity under the Act. A driver for Yellow Freight named Lee had been discharged for failing to provide medical substantiation for an illness that allegedly kept him off work. Lee had been off work for six weeks and was asked to provide medical documentation for his absence. When he failed to do so he was discharged. He then filed a grievance which was the subject of a grievance hearing. The complainant, Moyer, testified at the grievance hearing regarding the severity of Lee's medical condition and was himself subsequently discharged. Moyer filed a complaint under the STAA but the administrative law judge recommended dismissal of the complaint because Moyer's testimony did not relate to safety. The Secretary reversed his decision, but on appeal, the Court reversed the Secretary finding that there was no evidence that Yellow Freight pressured Lee to return to work before he was able to drive or that Lee and Moyer were challenging the medical substantiation requirement. Instead the Court found that the sole purpose of Moyer's testimony was to substantiate Lee's illness, and that "any relationship between the grievance proceeding and a possible safety rule violation was far too attenuated to trigger the protections of § 405(a)."

The present case is distinguishable from *Yellow Freight*. The grievance committee hearing related to Roadway's allegations that Gomaz had falsified his driver's logs in violation of 49 CFR § 395.8. Complainant's statement averred that Roadway had required him to falsify his logs and to work more hours than he was allowed. The purpose of keeping logs is to ensure that drivers do not drive more hours than they are legally allowed so that they are alert and not fatigued. An alert driver is obviously less likely to have an accident than a fatigued one. The keeping of drivers' logs directly relates to safety, and therefore the grievance committee hearing was based on possible safety violations. I find that Complainant engaged in protected activity.

#### Employer's Knowledge

Forrest testified that he did not tell Stanoch or anyone else of Complainant's statement at the grievance committee hearing and that Stanoch was unaware of Complainant's protected activity when he fired him. Forrest stated that he only told Schauer to reinstate Gomaz but did not mention Complainant's statement. Respondent did not call Stanoch as a witness and his knowledge or lack of knowledge of Complainant's protected activity can not be evaluated. Stanoch did talk to Schauer the afternoon of the grievance committee hearing and it was during that telephone conversation that Stanoch gave the order to discharge Complainant. Although it is not precisely clear what was said in these conversations, it is clear that Forrest talked to Schauer who then talked to Stanoch who then ordered that Cefalu be fired. I do not give credence to Forrest's testimony that he would not have mentioned Complainant's statement to Schauer or Stanoch because it was of such little consequence, as Complainant's statement directly accuses Roadway of ordering him to falsify his driver's logs. This is a serious charge and it strikes me as the kind of allegation that Forrest would have wanted to convey to Stanoch, who was his immediate superior. After evaluating the evidence, I find that Stanoch was aware of Complainant's protected activity when he discharged him.

### Temporal Proximity

Complainant's statement was offered at a grievance committee hearing that ended at 12:00 pm. Less than five hours later he was fired. It is hard to imagine a stronger case in which the temporal proximity of the protected activity and the adverse employment activity raises an inference of discrimination. *See Couty v. Dole*, 886 F. 2d 147, 148 (8<sup>th</sup> Cir. 1989).

### Legitimate Business Reason

Respondent did not offer any evidence at the hearing of a legitimate business reason for discharging Complainant. Although Complainant was told he was being fired for falsifying his employment application, there is no evidence of record that this was the reason for his discharge or that he did in fact falsify his employment application. Even if Respondent had offered such evidence, there is no evidence as to when Roadway found out about his alleged falsification. Roadway might have known about the false statements on Complainant's employment application for months and used them as a pretext for firing Complainant on the date his statement was offered in the grievance proceeding. The timing of his discharge strongly suggests that this may have been the case. In light of the close temporal proximity of Complainant's protected activity and his discharge, and in the absence of any evidence of a legitimate business reason for discharging Complainant, I find that Complainant has proven by a preponderance of the evidence that he was discharged because of his protected activity.

### Damages

Complainant is entitled to reinstatement at his prior position with Respondent as well as back pay. Although it is uncertain what Complainant would have earned had he not been discharged by Roadway, uncertainties as to what Complainant would have earned had he not been unlawfully discharged are to be resolved against the employer. *See Clay v. Castle Coal & Oil Co., Inc.*, 1990 STA-37 (Sec'y June 3, 1994). Complainant seeks compensation based on the representative employee formula which is used to give a reasonable approximation for what the complainant would have earned but for the illegal discrimination. *Ass't Sec'y and Reed v. National Mineral Corp.*, 1991-STA-34 (Sec'y June 24, 1992). The Joint Stipulation provides the wages earned by ten representative drivers employed by Roadway for the period from January 5, 2002 to November 1, 2003. The ten drivers earned an average of \$108, 04.74 with an average weekly wage of \$1137.94. Based on this figure, Complainant would have earned \$125,173.40 in the 110 weeks from his discharge on February 21, 2002 until April 1, 2004. ( $110 \times \$1137.94 = \$125, 173.40$ ). Complainant's back pay award must be offset by his earnings since his discharge. *Nolan v. AC Express*, 92-STA-37 (Sec'y Jan 17, 1995). Complainant earned \$78, 913.33 in interim wages from the date of his discharge until April 1, 2004 which produces a net wage loss of \$46,260.07 for which he should be compensated. He earned \$9157.62 working for Brandt Truck Line, Inc. in the first three months of 2004 which is an average of \$704.43 a week. See Complainant's brief at 14. I find that this figure best represents what Complainant will continue to earn until his reinstatement. Complainant is therefore entitled to continued compensation of \$433.51 a week ( $\$1137.94 - \$704.43$ ) from April 2, 2004 until he is reinstated. Respondent must also pay interest on the back pay award based on the rate of interest required by 29 CFR § 20.58(a) which is the rate for the underpayment of taxes found in 26 USC § 6621.

Interest is to be compounded quarterly. *Ass't Sec'y & Cotes v. Double R Trucking, Inc.*, ARB No. 99-061, ALJ No. 1998-STA-34 (ARB Jan. 12, 2000).

In addition to the back pay award, Respondent is ordered to pay the Teamster pension fund all the contributions it would have paid on Complainant's account if he had not been discharged on February 21, 2002. *Michaud v. BSP Transport, Inc.*, 95-STA-29 (ARB Oct. 9, 1997), Respondent must also delete any references in Complainant's employment records regarding action taken against him due to his protected activity and to post this decision and order at conspicuous locations at all its terminals for a period of sixty days. *Scott v. Roadway Express*, ARB No. 99-013, ALJ No. 1998-STA-8 (ARB July 28, 1999).

Complainant's counsel has thirty days to file a fully supported fee application and Respondent has twenty days in which to register any objections.

### RECOMMENDED ORDER

IT IS ORDERED THAT Respondent:

1. Reinstate Complainant to his former position;
2. Reimburse Complainant back pay of \$46,260.07 plus \$433.51 per week from April 2, 2004 until his reinstatement;
3. Pay interest to Complainant on the back pay award;
4. Delete references in Complainant's employment file to any adverse action taken against him because of his protected activity; and
5. Post a copy of this decision and order at conspicuous locations at all its terminals for a period of sixty days.

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DANIEL L. LELAND  
Administrative Law Judge

**NOTICE:** This Recommended Decision and Order and the administrative file in this matter will be forwarded for review by the Administrative Review Board, U.S. Department of Labor, Room S-4309, 200 Constitution Avenue, NW, Washington D.C. 20210. *See* 29 C.F.R. § 1978.109(a);